Public and Private Partnerships in African Countries  
– Laws and Comments

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Abstract. As an emerging way to foster the infrastructure development in Africa, Public Private Partnership has caught much attention and been gradually regulated in respective national legislations. Yet some deficiency in the laws and practices still exists, which impairs the effect of PPP projects and even evokes public protest. This article uses comparative analysis to substantiate the legal systems in African countries, and considers its strength and weakness.

History of PPP Legal Systems in Africa

Recent ten years have witnessed rapid economic growth in African countries, especially countries in Sub-Sahara Africa. From 2011 to 2015, around the globe, nearly half of the top 20 economies with rapiderst growth are African countries. However, the development of infrastructure should keep the same pace with the economic growth. According to a report from African Development Bank, in Africa each year there is a gap of almost 47 billion USD investment on average in infrastructure facilities to meet the demand for economic development [1]. The bottleneck problem posed by the shortage of infrastructure impeded the economic development of Africa. Nevertheless, PPP model breaks such predicament to accelerate African infrastructure construction and achieve an economic boom. A PPP project with a sound cost-benefit plan and risk distribution mechanism can, within the limited budget, provide the government with required infrastructure and public services for the support of economic development.

The implementation of PPP model requires full-fledged institutional framework, professional technical personnel, strong policy support and widespread social recognition. The success of PPP project counts on the government’s correct identification of projects, careful selection of private capital partners, fair and reasonable project agreement, and an appropriate balance of rights and obligations between different parties. Traditionally, the PPP model in Africa was dictated by various stakeholders from local governments, enterprises and the market. And no sound legal system or effective enforcement measure was in place. Meanwhile, the deficiencies of specialized legislation and management institutions of PPP, as well as unstable policies, have severely affected the success of PPP project. At present, African countries have realized the important impact of legal systems on safeguarding and guiding PPP models, and their legislation agenda is gradually including the establishment and improvement of PPP legal system. In the past six years, a number of African countries enacted or amended laws concerning PPP. According to an Infrascope African report by Economists think-tank in 2015, South-Africa, Kenya, Morocco, Egypt, Tanzania, Ivory Coast, Cameroon, Nigeria, Zambia and Uganda have set up specialized legal framework for PPP; Rwanda and Ghana have
also been stepping up their legislation work; while Congo and Angola at present having not yet. In particular, South-Africa, with standardized business processes, reasonable division of work between departments, advanced financial standard and well-established laws, has come to the first place with regard to PPP institutional environment in Africa and has set up paradigms by carrying out projects like Gautrain Rail Project. It is closely followed by Egypt and Tanzania, both of which have formulated specialized laws on PPP and obtained relatively mature and practical experience in this field [2].

The Characteristics of PPP Legal Systems in African Countries

Clear Understanding on PPP Model and Relatively Integrated Legislation

Most of African regions’ economic development is to a large extent hindered by backward infrastructure and inadequate public services. To break down the bottleneck of economic and social development, African countries have adopted PPP model to propel private capital investing in infrastructure and public services, expand the scale of infrastructure investment and improve the quality and efficiency of public service. With great emphasis on the positive impact of PPP legal system, African countries, by introducing clear and uniform laws on PPP, has readjusted the rights and obligations of PPP partners and properly distributed risks, creating a more stable, expectable institutional environment for PPP models. On one hand, it helps private capital owners including international investors to engage in their PPP projects, and on the other it reduces government discretion and uncertainty caused by policy changes, discouraging corruption and other rent-seeking behavior, thus promoting the cooperation between government and private capital.

Specified Management Institution and Functions in PPP Legislation

PPP models require the coordination between different levels of governments and different departments, comprehensive administrative capacity, efficient coordination mechanism, teamwork and the sense of responsibility. However, the capacity of governments in African countries is far from qualified. To solve this problem, African laws on PPP have regulated the participation of government bodies in PPP models from two perspectives. For one thing, it clearly stipulates in the top level legislation the function, authority, and responsibility of different levels of government and departments to participate in PPP projects, adopting the top-down reform. By this way, the interest conflicts and policy ambiguity between different public bodies would be avoided. For another, PPP specialized institutions, normally the national PPP units or PPP committees, are established by upper-level legislation to formulate national strategy, governance framework, policy instruction and guidelines. As one-stop service center, it also supervises in project development, assessment, procurement and management to provide overall intelligence support for PPP models. The establishment of inter-government and inter-department coordination mechanism and specialized institution via legislation are conducive to integrate limited resources, reduce the risk of government non-performance and non-cooperation, provide good conditions and convenience for private capital, cut transaction costs, and facilitate the procurement and implementation of PPP projects.
Setting PPP Procedural Norms and Related Mechanism Based on International Best Practices

African countries have drawn upon international experience to improve the reasonableness, effectiveness and comprehensiveness of their PPP legal system. Infrastructure Consortium for Africa, as a regional international organization, came out Attracting Investors to African Infrastructure Projects- A New Guide (PPP Guidelines) based on the experience of Britain and Australia to help African countries establish clear legal framework. Most of African countries learned from developed countries to regulate project design, identification, selection, procurement and management [3]. They also made reference to theories, like cost-efficiency, public sector comparison (PSC) and so on, to be in line with international standards. Meanwhile, government policy support, including specialized fund, financial support and tax breaks, is put in place. Moreover, considering the important role of fiscal control and management, African countries include a number of provisions in this area, especially debt management, and put them in the charge of specialized institution and the government accountability system. As a whole, African legislation on PPP fully took in advanced international experience, which provides policy guidance and institutional support for carrying out PPP projects in African countries.

Major Issues in African PPP Legal Systems

Lack of Effective Enforcement of Laws and Regulations

Although most African countries have adopted international best practices and formulated their PPP laws and legal polices, as a matter of fact, there is a huge gap between the targets and actual enforcement. For example, Nigeria formed an integrated system of PPP and related procedures without strict implementation and enforcement mechanism. Despite the fact that Nigerian PPP laws expressly provided full fairness and transparence in the process of procurement, under-table negotiations without due process still happen and government is biased towards its favored private capital owners, making it hard to guarantee the fairness and quality of projects. Besides, Nigerian PPP laws take arbitration as the foremost means of dispute resolution. Though the arbitration award could be recognized by judicial organs, the process is time-consuming. Its low efficiency undermines the interests of private capital owners and deprives them of timely remedies.

Poor Inter-Government and Inter-Department Cooperation

Generally, African PPP model involves multiple participants, and both central governments and local governments are entitled to carry out PPP projects. Though legislation has made requirements for inter-government and inter-department coordination, inter-government relations and division of powers between different government departments are blurry. Thus only one specialized PPP law is not enough to deal with the cooperation dilemma. For instance, Egyptian finance department and investment department, both entitled to develop PPP projects while the latter more focused on investment invitation, have some overlapped function and authority, short of overall guidance and norms on the division of work. Egyptian PPP Unit has in accordance with the law set up satellite units in other departments to improve the officials’ professional capacity in PPP projects and facilitate inter-department coordination. However, as these PPP satellite units are regulated and controlled by the PPP Unit under the Finance Department, the function and authority of governments which they attached to is potentially
diminished, and therefore the work of satellite units receives little support, adversely affecting the PPP projects. To set another example, in Nigeria, due to its unreasonable division of power, there is great disparity in PPP implementation framework, development level and service capability among different levels of government, which has influenced the stability and cost of PPP projects and brought greater financial risks. As a result, with deficient inter-department communication and great disparity in service and cooperation capacity among different levels of government, it is difficult to push forward PPP project in a comprehensive and effective way.

No Stipulations in Regard to PPP Institutional Bodies and the Professionals

The success of PPP models lies on plans on institution structuring and the arrangement of professional human resources. Any weakness in the process will lead to cask effect, affecting project implementation and undermining the rights and interests of partners as well as the general public. With relatively backward capital market, inactive market participants, inexperienced private capital owners in developing PPP projects, African countries to a great extent need government guidance. To this end, they have made relevant provisions in legislation to define the function and authority of PPP specialized institutions, which are to provide specialized services. However, related enforcement mechanism and punishment measures are always neglected, and budget is not fully available for project management. Moreover, the full lifecycle of PPP projects necessitates a pool of professionals in engineering, finances, economics and laws, but there is a gap between the actual personnel reserves and the human resources required for achieving PPP targets. No solution can be found in legislation; no incentives are available in improving human resources; and no trainings for government personnel. All of them make it impossible to improve PPP service capability. Moreover, the defective accountability mechanism of government departments further aggregated the nonperformance and slackness of public officials.

Deficiency in Transparency and Public Participation Regulation

Despite taking plenty of references from developed countries in terms of PPP legislation, African countries ignored the status quo of their economic and cultural development as well as their own development capacity, failing to encourage public participation and cultural identification. Inadequate communication and emphasis on public attribution to PPP models has led to deviation and difference in views of some African governments and individuals regarding the concept of PPP, and thus caused insufficient public support to the implementation of PPP laws. For instance, South-African government officials believe that PPP model could reduce job opportunities and lay off staff members, so they strongly oppose PPP models. This led to the boycott of implementing PPP laws by African National Congress and the Congress of South African Trade Unions.

Besides, PPP legislation in African countries ignores establishing an information sharing, communication and coordination mechanism among the government, private capital and general public. The inadequate communication between the government and relevant public, and the information asymmetry contribute to public misunderstanding and resistance towards PPP models, resulting failure to achieve intended results. For example, in 2012, Ugandan government tried to amend the Electricity Law to introduce automatic price adjustment mechanism so as to synchronously reflect the changes of inflation rate, foreign exchanges rate and energy prices in the user’s fee payment of PPP. Rejection from the public finally doomed this proposal. In general, South-African citizens regard PPP model as a way of privatization, and believe that private capital takes advantage of it to rake in state assets and obtain
commercial interests. So, in Gautrain Rail Project, they protested and refused to pay electronic toll fees, leading to turbulence and social instability. In conclusion, legal systems without public participation and social support make it difficult to implement PPP projects in Africa and also have bad impact on the image and credibility of African governments.

Summary
PPP model provides African countries with sufficient fund and advanced technology to mitigate the inefficiency of public organs in terms of the governmental function performance in basic facilities and services. Their PPP laws draw lesson from the international best practices and give a clear picture of PPP to the legislators. However, poor enforcement, incompetent officials and inherent bureaucratic problems leave the regulations vulnerable.

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References